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82-402

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

Appeal from Court of Appeals of Kentucky

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Under Kentucky law, a land rezoning decision must be based upon the evidence produced at a "trial-type due process hearing." By a special city ordinance, appellant's land was downzoned from a long-standing high density residential classification, after the mayor, who had not attended the evidentiary hearing, committed himself to downzoning proponents (of whose organization the mayor was a member) and broke a 4-4 voting deadlock among the planning commissioners who had heard the evidence. Two members of the city Board of Aldermen were also members of this same organization of downzoning proponents, and the entire Board deferred, by custom, to the recommendation of one of the organization's members who represented the ward where the land is situated. Appellant's land, thus singled-out, has been devalued, while the downzoning procedure utilized by the city has been upheld as a reasonable exercise of the police power by both the trial judge and by a 2-1 decision of the Kentucky Court of Appeals.

The federal questions are:

1. Is Ordinance No. 128, Series 1975, of the City of Louisville, unconstitutional because its enactment was accomplished by a series of procedures which were not fundamentally fair or in accordance with the due process clause of the fourteenth amendment?

2. Is the ordinance unconstitutional because it downzones only appellant's parcel of land, but does not apply to all other similarly classified parcels within the municipal boundary, and therefore violates the equal protection clause of the fourteenth amendment?

PARTIES

The appellant is Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased ("Durning").

The appellees are:

City of Louisville (the "City");

Louisville and Jefferson County Planning Commission (the "Commission"); and

Board of Aldermen of the City of Louisville (consisting, at the time of appeal to the Kentucky Court of Appeals, of aldermen Jim Allen; F. David Banks; Mike Carrell; E. Porter Hatcher, Jr.; Bill Heath; W. J. Hodge; Harold R. Howard; Steve Magre; Mary Margaret Mulvihill; Danny Ross; Allen M. Steinberg; and Sharon Wilbert; and now consisting of Cyril Allgeier; F. David Banks; Denver Butler; Michael Carrell; Tom Denning; Sharon Hall; E. Porter Hatcher; Steve Magre; Reginald K. Meeks; Arthur Smith; Allen M. Steinberg; and William H. Wilson) (the "Board").

Notice under Rule 28.4(c)

The constitutionality of an ordinance of a Kentucky municipal corporation has been drawn into question by this appeal, and 28 U.S.C. § 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, this Jurisdictional Statement has been served upon the Attorney General of the Commonwealth of Kentucky.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - *Appellant*

v.

CITY OF LOUISVILLE, et al. - - - *Appellees*

APPEAL FROM COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

May it please the Court:

Pursuant to Rules 12.3 and 15 of this Court, appellant Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased ("Durning"), files this statement of the basis upon which this Court has jurisdiction to review the judgment and opinion entered by the Kentucky Court of Appeals in this action. (Alternatively, if the Court holds the appeal is improvidently taken, Durning, as petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Kentucky entered on October 2, 1981; a rehearing of which was denied by that Court on April 9, 1982. A Motion for Discretionary Review to the Supreme Court of Kentucky was denied on June 29, 1982.)

OPINIONS BELOW

The majority and dissenting opinions of the Kentucky Court of Appeals rendered on October 2, 1981, are not reported but are contained in Appendix A, p. 23, *infra*. The denial of the Petition for Rehearing to the Kentucky Court of Appeals entered on April 9, 1982, is not reported but is contained in Appendix B, p. 29, *infra*. The order denying discretionary review to the Supreme Court of Kentucky entered on June 29, 1982, is not reported but is contained in Appendix C, p. 30, *infra*.

The judgment of the Jefferson Circuit Court dated August 27, 1980, is not reported but is contained in Appendix D, p. 31, *infra*. The opinion of the Jefferson Circuit Court dated August 15, 1980, is not reported but is contained in Appendix E, p. 32, *infra*. The minutes of the meetings of the Louisville and Jefferson County Planning Commission on January 23, 1975, March 6, 1975, March 20, 1975 and April 3, 1975, are not reported but are contained in Appendix F, G, H, and I, pp. 40-48, *infra*. The resolution of the Louisville and Jefferson County Planning Commission passed on April 3, 1975, is not reported but is contained in Appendix I, p. 47, *infra*. The relevant minutes of the meeting of the Board of Aldermen of the City of Louisville on October 14, 1975, are not reported but are contained in Appendix J, p. 49, *infra*. The ordinance of the City of Louisville passed on October 14, 1975, effective October 28, 1975, is not reported but is contained in Appendix K, p. 51, *infra*.

JURISDICTION

This is an appeal drawing into question the validity of a municipal ordinance downzoning real property on the ground that it is repugnant to the United States Constitution. The majority judgment and opinion of the Kentucky Court of Appeals, which is sought to be reviewed, was filed on October 2, 1981, and held the ordinance to be valid. A Petition for Rehearing was denied on April 9, 1982, and a Motion for Discretionary Review to the Kentucky Supreme Court was denied on June 29, 1982. The jurisdiction of this Court to review the final judgment by direct appeal is invoked pursuant to 28 U.S.C. § 1257(2) which provides for such an appeal where a state statute or local ordinance is upheld when assailed as repugnant to the Constitution. (This Court also has jurisdiction to review the judgment and opinion on a petition for certiorari pursuant to 28 U.S.C. § 1257(3).) Decisions which sustain the jurisdiction of the Court are *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 207, n. 3 (1975) (a city ordinance is a state statute for purposes of § 1257(2)); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977); *Eubank* v. *Richmond*, 226 U. S. 137 (1912).

ORDINANCE, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

City of Louisville ordinance (see Appendix K)

Ordinance No. 128 Series 1975, effective October 28, 1975:

"AN ORDINANCE TO CHANGE THE ZONING FROM R-7 APARTMENT TO R-5A RESIDENTIAL APARTMENT IN THE NORTHEAST CRESCENT HILL AREA. (Docket No. 9-130-74)

WHEREAS, the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the recommendations of the Planning Commission and its staff, and

WHEREAS, the proposed change in zoning is in agreement with the Comprehensive Plan, and

WHEREAS, the original zoning classification given to this property was inappropriate and improper, NOW, THEREFORE,

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE:

SECTION 1. That the herein described property as shown on the District Map accompanying and made a part of Zoning Ordinance No. 66, Series 1971, be and the same is hereby changed from R-7 Apartment to R-5A Residential Apartment as shown by plat attached hereto. Said property is in the City of Louisville and is described as follows:

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the South-

east line of a twenty-foot alley adjacent to the property of the Louisville Water Company; thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle, Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

SECTION 2. This Ordinance shall take effect upon its passage and approval."

Kentucky Revised Statutes

KRS 100.211(1)

"A proposal for amendment to any zoning regulation may originate with the planning commission of the unit, with any fiscal court or legislative body which is a member of the unit, or with the owner of the property in question. Regardless of the origin of the proposed amendment, it shall be referred to the planning commission before adoption. The planning commission shall then hold at least one (1) public hearing after notice as required by KRS Chapter 424 and make recommendations to the various legislative bodies or fiscal courts involved, and it shall take a majority of the entire

legislative body or fiscal court to override the recommendation of the planning commission."

KRS 100.213

"Before any map amendment is granted, the planning commission or the legislative body or fiscal court must find that the map amendment is in agreement with the community's comprehensive plan, or in the absence of such a finding, that one or more of the following apply and such finding shall be recorded in the minutes and records of the planning commission or the legislative body or fiscal court.

(1) That the original zoning classification given to the property was inappropriate or improper.

(2) That there have been major changes of an economic, physical or social nature within the area involved which were not anticipated in the community's comprehensive plan and which have substantially altered the basic character of such area."

United States Constitution

Fourteenth Amendment, Section One

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of the Facts[1]

Durning is the owner of a parcel of 2.4 acres of unimproved land that has been zoned since 1960 for a high density residential classification permitting up to 34 dwelling units per acre, and is shown as "high density" on the map of the county-wide Comprehensive Plan.[2]

On April 3, 1974, a tornado damaged certain improved areas of the City, felling trees on the Durning parcel. Thereafter, members of the Crescent Hill Community Council (the "Council") began meeting with City officials to formulate a downzoning plan intended to preserve the predominantly single-family character of a damaged area one-half mile from the Durning parcel.[3]

The Council is a private organization which included as members the mayor and his wife, two members of the Board of Aldermen (the "Board") and the

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[1]All of the essential facts and documents are contained in requests for admission, virtually all of which were either admitted or were ordered to be taken as admitted by the trial court under Civil Rule 36, which is substantially the same as FRCP 36(a). These admissions and court order are found in the record of this action at pages 103-139, 250-252, 334-342. Unadmitted facts were established by depositions filed in the record.

[2]R 2, Ex. A, R 103, 112, 250-251, Docs. 1 & 2.

[3]R 112, 114, 251.

director and a staff member of the Planning Commission (the "Commission"). Members of the Council had held receptions for the mayor during his 1973 election campaign. The Council favored single-family homes, generally opposed apartments, and in 1974 had a committee working "to facilitate downzoning efforts of the community." Neither Durning nor his family are members of this organization.[4]

A study team was formed of eight Commission staff members, one of whom was also a Council member and resided 480 feet from the Durning parcel. This team met with Council members and prepared a report recommending the downzoning of the damaged area of Crescent Hill, but also, unknown to Durning, recommended downzoning the vacant Durning parcel one-half mile away to an uncreated classification to be known as R-5A, which would reduce the number of permissible units from 34 to 12 per acre.[5]

Unknown to Durning, the mayor imposed an executive "moratorium" on building permits for properties targeted for downzoning, in order to prevent the owners from building upon their land in accordance with existing zoning classifications. The Board later passed an ordinance creating a legislative moratorium.[6]

The Council's president, Les Bryant, testified that their concern had been with the damaged area, and that he was "very much pleased . . . a little surprised"

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[4]R 112, 114, 251.

[5]R 107, Doc. 69, R 117, 251.

[6]R 115, 118-119, Docs. 42 & 58.

to see Durning's isolated parcel included in the downzoning proposal, and that after the downzoning had been completed on the damaged area, "we turned to the Durning property and that proposal and decided to see what we could do up there with that one.'"

'The complete text of this testimony follows (R 115-117, 251):

". . . [T]he two downzoning proposals came back from the Planning Commission, brought back to the neighborhood to the Community Council, which I think you have to understand that the Community Council was the only body in the area that had any cohesiveness, that halfway represented the people in the neighborhood. There is no way that we represented everybody. We firmly acknowledge that fact, but there was a group of almost 500 in the organization, so we felt like this was the only group that could really halfway speak for the neighborhood, so these two plans were brought back to us.

"One was the large parcel between Stilz, Frankfort, Bayly, and Grinstead Drive. The other parcel was Mr. Durning's piece of property which, to be there again candid, I hadn't given much thought about that property up there, to be honest, and when it came back I was very much pleased. I was a little surprised, because I knew this (indicating) [damaged Crescent Hill area] was definitely in need of some help, so far as some downzoning, but his piece of property there—I had only been up there once or twice after the tornado, and hadn't given it much thought, but apparently somebody on the Planning Commission had looked at this piece of property and decided that it needed to be downzoned, so they brought the proposals back to us, this big piece and Mr. Durning's piece, and we felt like at that time this piece (indicating) [damaged Crescent Hill area] was more important, that the work should be done on it, and as this thing progressed, as the months went by, I can't remember whether we suggested it or the Planning Commission did, but we broke these two pieces of property apart. In other words, when we went before the Planning Commission, it was decided that it would be wrong to take them together and say we want a vote on both of these right now, this one and this one. Somewhere down the line it was de-

(Footnote continued on following page)

In November of 1974, without notice to Durning, the Commission staff prepared an application[7] to downzone Durning's property to the uncreated R-5A classification, and the Commission assigned January 25, 1975, as the evidentiary hearing date for the Durning property and 2,000 other parcels. The Board then created the new R-5A zoning classification.[8]

About January 13, 1975, the Commission's staff notified Durning for the first time of the scheduled

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(Footnote continued from preceding page)
cided to break them apart, because we didn't know whether Mr. Durning's would possibly hold this up, or whether this would hold Mr. Durning's up, so I guess rather than to take a chance and to get both of them bogged down, we would send them through one at a time. We felt like this one (indicating) [damaged area] was the most important, so far as the neighborhood was concerned, because we had almost a paranoia fear at that time of the streets along Grinstead Drive being bought up by speculators for use for high density apartment zoning, so we felt like we had to do something here (indicating) [damaged area] immediately. So, that is, in fact, what we did, and that was run on through with practically no opposition. So, after that was completed, and was in fact, downzoned, we turned to the Durning property and that proposal and decided to see what we could do up there with that one.

". . . The Durning area up there is fairly isolated. There are no homes on that property, so, therefore, you know, it just stands to reason to me, logically, that we weren't really concerned about it. I mean, sure, I realized it was high density zoning, but down here we had buildings that were down and we felt certain that people weren't going to rebuild these houses, they were going to be sold out and that's the reason I put such a prime importance on this part was the fact there was going to be some selling done here, some property changing hands, which I didn't feel like was the case with the Durning property."

[7] R 106, Doc. 52, R 250.

[8] R 118, 251.

January 25 hearing date. After the hearing, members of the Commission deadlocked 4-4 on the proposal to downzone the Durning parcel. This deadlock continued at the March 6 and March 20 meetings.[10]

On March 31, Council members who lived near the Durning parcel and who had hosted a campaign reception for the mayor, telephoned the mayor (who was also a member of the Council) and asked him to break the 4-4 Commission deadlock in his capacity as an *ex officio* member of the Commission—although the mayor had never before attended a Commission rezoning hearing in this capacity and had not heard the evidence presented at the January 25 hearing in the Durning case.[11] Other Council members sent letters to the mayor.[12] The Council president testified that the mayor committed himself to downzoning the Durning parcel.[13]

On April 3, 1975, without notice to Durning, the mayor examined a copy of the record of the Durning hearing, which omitted certain exhibits and included matters *dehors* the record, and made a private visit to the Durning parcel, returning to the Commission meeting on the same day to break the deadlock. A mayoral employee on the Commission—the City Director of Works—made the motion to downzone, which was

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[10]R 119-121-122, 251.

[11]R 124, 126, 251, 336-337.

[12]R 108, Docs. 82-90, R 124, 251.

[13]"I think we got a commitment in a sense, yes sir. I can't recall what his exact words were, but the impression I got from him was that he was, more or less, certainly in favor of the downzoning and would do everything in his power to see that it was carried out, . . ." Bryant Dep. 148; Spring. Dep. 68-69.

seconded by a mayoral appointee to the Commission who switched from her previous position in order to side with the mayor.[14] The chairman of the Commission switched his position in order to oppose downzoning, explaining:

> "I felt Mayor Sloane was trying to ram something down our throats there and I felt like it was improper."[15]

Immediately following the tie-breaking vote, counsel for Durning was permitted by the Commission to interrogate the mayor, who assured counsel that he had no conversations with people in the Crescent Hill area about the situation and that no one had called or written to him about how he should vote.[16] Six days later, the mayor sent letters of acknowledgment to those members of the Council who had solicited his tie-breaking vote.[17]

As pointed out in the dissenting opinion of the Kentucky Court of Appeals, the Commission's findings of fact appear to deny Durning due process of law.[18]

With additional prodding by the Council,[19] the Commission's downzoning recommendation was implemented by an ordinance of the Board of Aldermen, two of whose members[20] also belonged to the Council. The

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[14]R 125-126, 251.

[15]Spring. Dep. 118.

[16]R 126, 251.

[17]R 128, 251.

[18]Appendix A, p. 25, *infra*.

[19]R 128, 133-135, 251.

[20]R 114, 251.

procedures followed by the Board also denied Durning due process of law.[21] The downzoning ordinance[22] went into effect on October 28, 1975.[23] The resulting estimated depreciation of the Durning parcel ranges from $33,000 to $88,500, depending upon the manner in which the parcel would be developed.[24]

Although there are other parcels in the vicinity zoned high density that could have been downzoned, the Durning parcel was the only one singled out and downzoned on the north side of Frankfort Avenue in Louisville, Kentucky.[25]

B. Procedural History

This court action began with a complaint filed by Durning against the City and the Commission,[26] stat-

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[21]Not only did Board members attend a private viewing of "evidence" supplied by Commission staff members after the evidentiary hearings on January 25, 1975, but when the Commission's thus adopted recommendation went to the Board, First Ward Alderman William B. Stansbury, a member of the Council whose constituents include the residents of Crescent Hill, favored adoption of the ordinance downzoning the Durning parcel. His endorsement guaranteed adoption because of a longstanding practice of the aldermen to support, without question or exercise of judgment, any zoning change advocated by the alderman of the ward wherein the land involved in the rezoning is located. The Board, following their custom, unanimously approved the downzoning ordinance. R 129, 136, 251-252, 422-426, Spring. Dep. 80-86.

[22]Appendix K, p. 51, *infra*.

[23]R 135, 251.

[24]Baugh Dep. 35-36.

[25]R 137-138.

[26]Subsequently, separate counsel for the Board of Aldermen appeared and participated in all stages of the action.

ing, *inter alia*, that the procedure leading up to the adoption of the Commission's downzoning recommendation and the City's downzoning ordinance failed to accord Durning either procedural or substantive due process of law and rendered the ordinance unconstitutional and void under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.[27] These Federal issues were further seasonably asserted by Durning in his *proposed* Findings of Fact and Conclusions of Law[28] tendered to the trial court and incorporated into his trial court brief[29] and asserted in his reply brief,[30] and

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[27]Paragraph 12 of the Complaint states (R 7):

"The procedure leading up to the adoption of the recommendation by the defendant Planning Commission to downzone the plaintiff's property from R-7 Apartment to a newly-created classification of R-5A Residential-Apartment, and the procedure followed by the defendant City of Louisville in adopting Ordinance 128, Series 1975, implementing the recommendation of the defendant Planning Commission, was arbitrary and capricious; constitutes the unlawful taking of a valuable property right of the plaintiff without due process of law; failed to accord the plaintiff either procedural or substantive due process of law; and renders Ordinance 128, Series 1975, unsupported by substantial evidence, unconstitutional and void, within the meaning of sections 1(5), 2, 13 and 242 of the Kentucky Constitution; and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution."

[28]Pp. 1, 45-49, 54-55. See Appendix M, pp. 54-55, *infra*. These proposed findings and conclusions were inadvertently omitted from the original record on appeal, and were separately certified by the trial court on March 30, 1981, as a supplement to the record on appeal.

[29]R 501, 506, 509; Appendix M, p. 55, *infra*.

[30]R 565-566, 586, 608, 620.

at all stages of the appellate proceedings, including his brief,[31] reply brief,[32] and petition for rehearing[33] in the Kentucky Court of Appeals, and his motion for discretionary review[34] in the Kentucky Supreme Court.

The trial court ruled[35] that there was no denial of due process of law, and the majority opinion of the Kentucky Court of Appeals adopts[36] the opinion of the trial court, while the dissenting opinion[37] finds the downzoning to be arbitrary, illegal and void. Neither the trial court nor the appellate court discussed the specific questions of procedural due process or equal protection, or mentioned any of the specific facts upon which Durning bases his claim of a denial of procedural due process and equal protection under the Fourteenth Amendment.

SUBSTANTIALITY OF FEDERAL QUESTIONS

Much more is involved here than the injustice done to Durning. The real issues are whether the governing body of any locality or state may, on any pretext, downzone only certain parcels of land without the consent of the owners; and, if such special legislation is permissible, what "rudiments of fair play"[38] are due

[31]Pages 16 through 23.
[32]Page 4.
[33]Page 5.
[34]Pages 17 through 23.
[35]Appendix E, pp. 36 and 38, *infra*.
[36]Appendix A, p. 25, *infra*.
[37]Appendix A, pp. 25 and 28, *infra*.
[38]*Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, 168 (1914).

an owner in such a confrontation with the government, under the due process clause of the fourteenth amendment? If downzoning is merely a political matter, then the scope of a citizen's use of his property is subject to the whim of either the local legislative body or a majority of the electorate or neighbors. On the other hand, if downzoning is an adjudicative or quasi-judicial matter, as the Kentucky court has held rezonings to be in an earlier decision,[39] and as the Kentucky Court of Appeals stated in this Durning case,[40] then there are basic due process requirements which must be observed by the governing body and its officials from beginning to end—from the conception of the idea by either the planning commission or legislative body, throughout all subsequent procedures, including a fair and impartial hearing and deliberation and fact-finding by the members of all agencies and bodies that play a role in the process. Without these essential ingredients—especially fair and impartial decisionmakers, a landowner receives "nothing but the semblance of a hearing." *Chin Yow* v. *United States*, 208 U. S. 8, 12 (1908).

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[39] *City of Louisville* v. *McDonald*, Ky., 470 S. W. 2d 173, 179 (1971).

[40] Appendix A, p. 24, *infra* (". . . [T]he hearing . . . satisfied the requirements of an adjudicatory hearing and due process.")

A. THE DOWNZONING ORDINANCE IS INVALID BECAUSE THE PROCEDURES UTILIZED BY THE CITY OF LOUISVILLE AND THE PLANNING COMMISSION DID NOT COMPORT WITH BASIC REQUIREMENTS FOR DUE PROCESS OF LAW.

During the half-century since *Euclid* v. *Ambler Co.*,[41] this Court has considered "only a handful of zoning cases,"[42] none of which involved the question of what fundamental procedures are required by the due process clause of the Fourteenth Amendment when the governing authority initiates proceedings to downzone a parcel of land.[43] No reported federal court decision has struck down a state zoning authority's decision for failing to adhere to procedural due process require-

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[41]272 U. S. 365 (1926). The Court pointed out that constitutional questions involving the application of a zoning law to particular properties should be resolved as the cases arise. *Supra* 272 U. S at 397.

[42]See *Eastlake* v. *Forest City Enterprises*, 426 U. S. 668, 683 (1976), dissenting opinion by Justice Stevens.

[43]*Eastlake*, *supra* n. 14, concerned an unusual popular referendum procedure for the approval of rezonings, and did not involve downzonings instituted by the governing authority. *Arlington Heights* v. *Metro Housing Corp.*, 429 U. S. 252 (1977) concerned alleged racial discrimination and the application of the equal protection clause to a *refusal* to upzone. All other decisions involved the *substantive* due process requirements for comprehensive general municipal ordinances having city-wide application. *Nectow* v. *Cambridge*, 277 U. S. 183 (1928); *Goldblatt* v. *Hempstead*, 369 U. S. 590 (1962); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1 (1974); *Young* v. *American Mini Theatres*, 427 U. S. 50 (1976) (equal protection); *Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977); *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Schad* v. *Mt. Ephraim*, 452 U. S. 61 (1981).

ments,"[44] and there exists a conflict among the highest courts of the various states as to whether rezoning is a purely legislative or political matter[45] to which principles of due process have limited application; or whether rezoning proceedings are quasi-judicial in nature.[46] Other jurisdictions take a position somewhere between the foregoing views.[47] Kentucky's highest court has held that the enactment of a comprehensive city-wide zoning plan is a legislative matter, but the rezoning of specific parcels of property is an adjudicative matter requiring a "trial-type due process hearing."[48] The majority opinion of the Kentucky Court of Appeals refers to the downzoning hearing in this case as "adjudicatory."[49] Given the law, therefore, that Durning was entitled to such a due process adjudicatory hearing in this case, it seems indisputable that the first requirement is the impartiality of all decisionmakers. *In re Murchison*, 349 U. S. 133, 136 (1955); *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970); *N.L.R.B.* v. *Phelps*, 136 F. 2d 562, 563-564 (5th Cir. 1943). This requirement was totally lacking from the time that the mayor

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[44]Kahn, *In Accordance With a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L. Q. 1011, 1012 (1979).

[45]Phillips, *The Appearance of Fairness Doctrine*, 20 URBAN L. ANN. (1980), p. 82, note 40.

[46]*Id.* note 45, page 83 of article, footnote 47; *Eastlake* v. *Forest City Enterprises*, 426 U. S. 668, 683-684 (1976); *Fleming* v. *City of Tacoma*, 81 Wash. 2d 292, 502 P. 2d 327 (1972).

[47]*Id.* note 45, page 83 of article, footnote 48.

[48]*City of Louisville* v. *McDonald*, *supra* 470 S. W. 2d 173, 179.

[49]Appendix A, p. 24, *infra*; n. 40, *supra*.

of Louisville (a member[50] of the organization of downzoning proponents, and committed[51] to the Durning downzoning) injected himself into the proceedings and broke the deadlocked vote of the planning commissioners. This lack of impartiality continued through to the termination of the proceedings, when the matter went to the Board where the ward alderman (who was also the aldermanic president) and one other alderman were also members of the formal organization of downzoning proponents. When the ward alderman favored the downzoning, that assured passage of the ordinance because of aldermanic custom.[52]

In addition to the essential requirement of impartiality, the final adjudication of the decisionmakers must rest solely on the evidence adduced at the hearing, and should state the reasons for the determination and indicate the evidence relied upon. *Goldberg, supra* 397 U. S. at 271. Not one of these basic requirements was accorded Durning.[53] Certain members of this Court have discussed the applicability of basic due process requirements to adjudicative proceedings lead-

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[50]R 114, 251.

[51]*Supra* n. 13; Bryant Dep. 148; Spring. Dep. 68-69.

[52]*Supra* n. 21; R 136, 251-252; Spring. Dep. 80-86.

[53]The reasons stated in the Commission's downzoning resolution, and in the City's downzoning ordinance, are parrotings of statutory requirements and of general planning principles and objectives listed in the text of the community's comprehensive plan. See KRS 100.213 and R 2, Ex. A. This comprehensive plan is authorized by KRS 100.183, and its statement of objectives, principles and policies is required by KRS 100.187(1). See also dissenting opinion of Kentucky Court of Appeals, Appendix A, p. 25, *infra*.

ing up to the rezoning of specific parcels of land.[54] In denying Durning any relief, the Kentucky courts have eviscerated the rights which lie at the very core of due process.

B. THE LOUISVILLE DOWNZONING ORDINANCE IS INVALID BECAUSE IT CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The highest court of Kentucky has recognized that a land use ordinance confined in its application only to a particular block in a section of a city is discriminatory and void as a denial of equal protection of the law. *City of Covington* v. *Summe & Ratermann Co.*, 210 Ky. 520, 524, 276 S. W. 534, 535 (1925). Although both this decision and the equal protection clause of the Fourteenth Amendment were asserted in the Kentucky Court of Appeals[55] and denial of equal protection was again asserted in appellant's motion for discretionary review to the Kentucky Supreme Court,[56] and although a denial of equal protection had been asserted in the trial court,[57] none of the courts acknowledged the claim.

This Court early recognized that equal protection of the laws is denied when, between two persons similarly situated, "burdens are cast upon one which are not cast upon the other," *Cotting* v. *Godard*, 183

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[54] *Eastlake* v. *Forest City Enterprises*, *supra* 426 U. S. at 682-684. This case involved a referendum procedure not authorized by Kentucky law.

[55] Appellant's Brief, pp. 16 and 20-21; Reply Brief, p. 5; Petition for Rehearing, p. 5.

[56] Motion for Discretionary Review, p. 17.

[57] R 7; *supra* n. 27.

U. S. 79, 111-112 (1901); *Truax* v. *Corrigan*, 257 U. S. 312, 332-333 (1921), and that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights" is an essential pre-condition to the realization of other basic rights guaranteed by the Fourteenth Amendment, which invalidates any and all manifestations of state action—legislative, judicial, or executive—inconsistent with these basic guarantees. *Shelley* v. *Kraemer*, 334 U. S. 1, 10, 14 (1948). Nor can an arbitrary selection of one person or several persons be justified by merely calling it a "classification." *Cotting* v. *Godard, supra* 183 U. S. at 107; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37 (1928). Indeed, legislation embodying certain classifications is presumptively invalid unless a compelling state interest is shown as justification. Such prohibited classifications include sex,[58] race,[59] national origin,[60] and legitimacy.[61] One landowner or a group of landowners—but less than all—owning land zoned for high density use, is an equally questionable classification for downzoning ordinances instigated by residents of predominantly single-family neighborhoods.

Appellant does not question the validity of the original Louisville ordinance adopting zoning classifications for all parcels of property within the munici-

[58] *Frontiero* v. *Richardson*, 411 U. S. 677 (1973).
[59] *Loving* v. *Virginia*, 388 U. S. 1 (1967).
[60] *Oyama* v. *California*, 332 U. S. 633 (1948).
[61] *Levy* v. *Louisiana*, 391 U. S. 68 (1968).

pal boundaries. However, an arbitrary downzoning of this one singled-out parcel of land located a half mile away from any other rezoned parcel is discriminatory and a violation of the equal protection clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, and based upon the authorities cited, this Court should take jurisdiction of this appeal, or, in the alternative issue a writ of certiorari to the Kentucky Court of Appeals to review its judgment. In either event, this Court should invalidate Ordinance No. 128, Series 1975, of the City of Louisville and reverse the decision of the Kentucky Court of Appeals rendered on October 2, 1981.

Respectfully submitted,

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APPENDIX A

OPINION RENDERED: OCTOBER 2, 1981; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

80-CA-1955-MR

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. Durning, Deceased - - - *Appellant*

v.

CITY OF LOUISVILLE;

THE LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION; and

THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE (Which Board now Consists of Aldermen Jim Allen; F. David Banks; Mike Carrell; E. Proter Hatcher, Jr.; Bill Heath; W. J. Hodge; Harold R. Howard; Steve Magre; Mary Margaret Mulvihill; Danny Ross; Allen M. Steinberg; and Sharon Wilbert) - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Charles H. Anderson, Jr., Judge
Action No. 208281

AFFIRMING

BEFORE: GANT, GUDGEL, and HOWERTON, Judges.

HOWERTON, JUDGE. Durning appeals from a judgment of the Jefferson Circuit Court upholding the rezoning (downzoning) of his property from R-7 to R-5A. He argues that

the trial court erred by treating the rezoning as a legislative rather than as an adjudicative decision, that he was denied due process of law, that the rezoning was not supported by substantial evidence, and that the Planning Commission and Board of Aldermen failed to comply with the zoning statutes.

Each of the alleged errors is reviewable, although judicial review of zoning decisions is rather limited. *Fallon* v. *Baker*, Ky., 455 S.W. 2d 572 (1970). The issues are primarily considered to determine whether the action by the administrative or legislative body was arbitrary. *Id.*, at 574.

We have studied and considered the record and the arguments, and we find no arbitrariness or any reversible error. The applicant for the change was the Planning Commission. Document 66 in the record is the staff analysis of the situation, and it contains ample evidence to support the requirements of KRS 100.213 for a zoning change. Document 71 is the record of the hearing before the Planning Commission. It reveals that evidence was presented for and against the proposed change. Various supporting reports and documents were incorporated in the record. Durning's attorney opposed the change at that hearing. Although the hearing was conducted informally, it satisfied the requirements of an adjudicatory hearing and due process. *Fiscal Court* v. *Ogden*, Ky. App., 556 S.W. 2d 899 (1977). *See also, McKinstry* v. *Wells*, Ky. App., 548 S.W. 2d 169 (1977). The Planning Commission used a reasonably fair and complete fact-finding procedure in making its determinations. We find no failure to comply with the statutes.

The legislative body thereafter reviewed and adopted the findings and recommendations of the Commission and rezoned the property. It was not necessary for the Board of Aldermen to conduct a *de novo* adjudicative hearing in

order to approve the recommendation of the Commission. *City of Louisville* v. *McDonald*, Ky., 470 S.W. 2d 173 (1971).

We are in general agreement with the trial judge's opinion dated August 15, 1980. The essential facts are set forth therein. We adopt it as the opinion of this Court, and for reasons and conclusions expressed in that opinion and herein, we affirm the judgment of the Jefferson Circuit Court.

GANT, JUDGE, CONCURS.

GUDGEL, JUDGE, DISSENTS.

GUDGEL, JUDGE. DISSENTING. I respectfully dissent. In my opinion, the downzoning of appellant's property from R-7 to R-5A, at the request of the Planning Commission's staff, was both arbitrary and illegal.

KRS 100.213 prohibits the amendment of a zoning map unless the proposed amendment conforms with the community's comprehensive plan. The Commission found that the downzoning was in conformity with the comprehensive plan because it satisfied the principle of the plan that existing sound residential areas—neighborhoods—should be conserved, and deteriorated residential areas with redeeming qualities regenerated.

Specifically, the Commission found that the rezoning of appellant's property to a zoning classification that permits a maximum density more closely related to the existing residential density in the area promoted the conservation of the residential nature of the area. This finding by the Commission, in my opinion, is almost incredulous. The logic of it completely escapes me.

The rezoning of appellant's land does not conserve the residential character of the Crescent Hill area. The area was zoned residential before the rezoning and is still zoned

residential after the rezoning. How then could the Commission members legally find that the rezoning of appellant's land had the effect of promoting the conservation of the residential character of the area? The obvious answer is that they could not. In fact, the lowering of the permitted density in a residential area, as was accomplished here, operates to decrease the number of residential units available in a given area. Therefore, if anything, such a rezoning is in violation of the residential principle of the comprehensive plan since it does not help to conserve all available residential resources.

As a backup to its finding that the downzoning was in conformity with the comprehensive plan, the Commission found under KRS 100.213(1) that the original zoning of the property was inappropriate because it permitted high density residential development of a location not having direct or convenient access to a major street or highway in violation of a second principle of the comprehensive plan. This finding, like the Commission's first finding, is completely unsupported by the record. While appellant's property does not have direct access to a major street, it does have convenient access to such a street. This is clearly shown on the maps of the area which were before the Commission, and merely because that access happens to be through a single family residential area does not render the access inconvenient. Convenient access exists nevertheless.

The Commission also found under KRS 100.213(2) that there had been a major change of an economic, physical, or social nature within the area not contemplated by the comprehensive plan which had altered the basic character of the area. This finding is also completely unsupported by the record. According to the Commission, the change which altered the basic character of the area was the destruction caused by the April 3, 1974 tornado which struck Louis-

ville. However, the Commission's staff admitted at the hearing that the Post-Tornado Planning Report showed that the area was in relatively sound condition even though the area suffered extensive damage. In short, there was nothing before the Commission on which they could base a finding that the basic character of the area had been altered by the 1974 tornado damage. In fact, just the opposite is true, as most of the homes damaged have been rebuilt and restored.

The majority concludes that there was ample evidence to support a finding that the requirements of KRS 100.213 were met. I cannot agree that such is the case, as I am satisfied that there is no evidence to support a finding that the requirements of KRS 100.213 were met.

The effect of the downzoning in this case was to limit the number of residential units appellant may erect on his property to 51, although he originally had a right to erect 102. I believe that this downzoning of his property was accomplished illegally in violation of KRS 100.213. This is especially true in my view since the comprehensive plan designated appellant's property as part of an area which should be developed as a high density residential area.

Accordingly, I would reverse the judgment of the circuit court and remand this cause, with directions to enter a judgment declaring the downzoning of appellant's property to be arbitrary, illegal, and void.

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APPENDIX B

COURT OF APPEALS OF KENTUCKY

No. 80-CA-1955-MR

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Appellant*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Charles H. Anderson, Jr., Judge
Action No. 208281

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, GUDGEL and HOWERTON, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: April 9, 1982

(s) William M. Gant
Judge, Court of Appeals

APPENDIX C

SUPREME COURT OF KENTUCKY

82-SC-347-D
(80-CA-1955-MR)

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Movant*

v.

CITY OF LOUISVILLE, Et Al. - - - *Respondents*

Jefferson Circuit Court
No. 208281

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, Deceased for a review of the decision of the Court of Appeals is denied.

ENTERED June 29, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

THIRD DIVISION

No. 206281

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Plaintiff*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Defendant*

JUDGMENT

Now, this case having been submitted to the Court on the basis of the record and briefs filed by counsel for the respective parties and the Court having thoroughly considered such record and briefs and having rendered its Opinion, Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Court's Opinion, Findings of Facts and Conclusions of Law dated August 15, 1980 are incorporated herein and made a part hereof.

2. The action of the plaintiff, Robert L. Durning, Jr., trustee, is hereby dismissed with prejudice at the cost of the plaintiff.

3. This judgment is final and there is no just reason for delay.

(s) Charles H. Anderson
Judge

Date: August 27, 1980

Tendered by:

(s) Alex F. Talbott
Attorney for Louisville & Jefferson
County Planning Commission

APPENDIX B

JEFFERSON CIRCUIT COURT

THIRD DIVISION

No. 206,281

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. Durning, Deceased - - *Plaintiff*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Defendant*

OPINION, FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This is an action by Plaintiff for an Injunction against the city of Louisville preventing the enforcement of Ordinance No. 128 Series 1975 which down-zoned Plaintiff's property from R-7 to R-5A.

The Plaintiff contends that the Ordinance changing the zoning of Plaintiff's property is unconstitutional because it was enacted in an arbitrary proceeding which denied Plaintiff his constitutional rights of due process of law.

The Defendant contends that the Ordinance was enacted according to law as a result of the April 1974 Tornado and is constitutionally valid.

The evidence clearly shows and the Court finds that the Defendant, City of Louisville, through its Board of Aldermen acting upon the recommendation of the Louisville & Jefferson County Planning Commission changed the zoning classification of Plaintiff's property from R-7 to R-5A. As a result, apartment development density permitted was reduced from a maximum of thirty-four dwelling units per acre to a maximum of twelve dwelling units per acre.

The record indicates that the Durning property in 1960 (the area in red on Document 1 and 2 under Admission B) was re-zoned by the Defendant, City of Louisville, to a C-Apartment classification which authorized up to thirty-four dwelling units per acre. After the adoption of the current zoning regulation the C-Apartment classification became R-7 apartment classification which also authorized up to thirty-four dwelling units per acre along with certain other uses. (Admission B Doc. 8 and 71) (Page 15 and 16 and D 2).

The Comprehensive Plan adopted by the City of Louisville in 1970 as required by KRS 100.183 designated the Durning property as high density of not less than thirteen dwelling units per acre (Adm. A, Exh. A attached to Complaint herein) (Spring Depo. Page 36-38, Adm. B. Doc 40 and 66).

The Tornado of 1974 damaged and destroyed improvements in certain parts of Jefferson County within the area of the Durning property shown in Doc. 1 Adm. B. Two houses were destroyed, two sustained major damages, including the residence of Mr. R. L. Durning, Sr., and approximately seventeen houses sustained roof damages that was repaired after the Tornado. A number of trees were downed on the unimproved Durning property which is the subject of this action (Adm. B Doc. 40 Page 42, Plat 9 Page 45, Plat 12 Doc. 71, Page 18019 Adm. D 10).

The record further indicates that shortly after the Tornado the Crescent Hill representatives of the Neighborhood Development Office wrote a Memorandum which states as follows (Adm. B. Doc. 15):

> "The City Law Dept., Neighborhood Development Office and Planning and Zoning and Building Department have already met and are working on a plan to preserve and improve, when possible, the integrity of

the Crescent Hill. These people have presented a plan to the Mayor and he in turn will present this plan to the people of Crescent Hill for their review.

The mayor thinks it is important that the City have input from Crescent Hill in order to act in a manner that would best serve the Crescent Hill area."

The Planning Commission's evaluation of the effected area was published in the "Post Tornado Planning Report". The Report evaluated the population growth and the demography of the affected area and the City in general, the existing land use pattern of the surrounding area including the zoning classification, the potential impact of any redevelopment of the area in light of the principles and goals of the community's Comprehensive Plan. (See Appendix 1 to Staff Report Page 11, Commission record)

The Findings of the Report were that the existing character of the land use which had developed was not compatible with the zoning which was authorized; that the residential neighborhood which had developed were sound and viable and that, therefore, the high density development which was permitted in the area by the existing zoning classification would be adverse to the best interest of the public welfare and contrary to the following principles of the Comprehensive Plan, to-wit:

"Existing sound residential area neighborhoods should be conserved and deteriorated residential areas with redeeming qualities should be regenerated."

Residential Planning principle No. 5, Louisville & Jefferson County Comprehensive Plan 1971.

The Planning Commission after reviewing the Report and upon a concurring recommendation from a site inspection committee which made several trips to the affected

area held a special public hearing on January 25, 1975, to review arguments for and against the proposed change in zoning. The Plaintiff here, as a property owner of a vacant lot zoned high density in one of the areas recommended for rezoning, was present at that meeting and his arguments against the zoning changes were presented by his attorney as indicated of record herein (Line 23 Page 47, Line 24 Page 59, Commission Record).

After the public hearing the Planning Commission was divided on the zoning issue and was unable to recommend approval or disapproval. The division continued through several subsequent meetings in which the issue was reconsidered.

On April 3, 1975, when the Mayor of the City of Louisville, a member of the Planning Commission pursuant to KRS 100.137 attended a regular scheduled Commission Meeting and voted in favor of recommending approval of the re-zoning. The proposal was then forwarded to the Board of Aldermen, the legislative body with final authority on proposed zoning amendments. The Aldermen unanimously voted to adopt City Ordinance 128 Series 1975 which affected the zoning change after making the following Findings:

> "Whereas the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the Recomendation of the Planning Commission and its staff and,
>
> Whereas the proposed change in zoning is in agreement with the Comprehensive Plan and,
>
> Whereas the original zoning classification given to this property was inappropriate and improper,
>
> Now, Therefore, be it ordained by the Board of Aldermen of the City of Louisville: that the herein

described property is hereby changed from R-7 Apartment to R-5A Residential."

The Court finds that the legislative standards which must be met in order to properly effect this type of change in zoning pursuant to KRS 100.213 have been established. Contrary to Plaintiff's argument our courts have held that the Comprehensive Plan serves as a guide rather than a straight jacket. See *Ward* v. *Knippenberg*, Ky. 416 S. W. 2d 746.

While the mapped portion of the Comprehensive Plan projected high density apartment development in this area the re-zoning has only adjusted the authorized zoning to a medium density apartment development. This does not appear to be a major deviation from the mapped portion of the Comprehensive Plan. Therefore, the Court finds that the legislative body correctly found that the zoning change was in agreement with the Community's Comprehensive Plan and the Board of Aldermen did not have to find that the existing zoning classification of the Plaintiff's property was completely inappropriate. KRS 100.213. However, it is noteworthy that the independent conclusion of the Post Tornado Planning Commission Site Inspection Committee found that the existing zoning was inappropriate in light of the above principles of the Comprehensive Plan.

Consequently, there was substantial evidence in support of the Board of Aldermen finding that the then existing zoning classification was inappropriate and improper. Accordingly, the Court finds that the down-zoning of Plaintiff's property was carried out in accordance with due process and is supported by sufficient evidence of a probative value.

This Court interprets the McDonald case to indicate that when re-zoning is a result of large scale studies and planning as indicated in the Firtts case that the changes are

legislative. That the accomplished change or re-zoning is legislative rather than adjudicative in nature. Consequently, a trial type hearing is not required. *Firtts* v. *City of Ashland*, Ky., 348 S. W. 2d 712 and *City of Louisville* v. *McDonald*, 470 S. W. 2d 173. In these cases the Court held that the Court would not and could not impose its independent judgment over that of the City's legislative body which has been constituted by statutory authority to make such a decision.

Our Courts long ago held that it was unconstitutional for the legislature to confer upon the judiciary the power to become directly involved in the zoning process by way of de novo trials and have somewhat limited the Courts review to the record as made at the legislative stage. See *American Beauty Home Corp.* v. *Louisville*, 379 S. W. 2d 450.

Plaintiff has offered an exhaustive indication of factual circumstances which could conclude that the down-zoning was the result of political influence or for personal gain in some form or another. However, this Court finds that the record does not support a finding of fraud or arbitrariness in accomplishing the re-zoning of Plaintiff's property.

Courts will not inquire into reasons motivating a legislative body's enactment of zoning ordinance and the cases indicate that the Court may only determine if the legislative body had authority to enact a zoning ordinance, whether it was enacted arbitrarily, whether it is unreasonable and whether it bears a reasonable relationship to the public health and welfare. See *Hamilton* v. *Ky. Distilleries and Warehouse Co.*, 551 U. S. 146, also *Clark* v. *City of Paducah*, 439 S. W. 2d 84.

Plaintiff has also presented a forceful argument on the issue of not receiving notice or being afforded an opportunity to be heard at all stages concerning the re-zoning of his property. However, the Court finds that the cases do not seem to indicate that it is absolutely necessary that one

who has property that is being re-zoned must receive absolute and complete notice of every proceeding in conjunction with the re-zoning of the property.

In the case of *Bellemande* v. *Priddle*, 503 S. W. 2d 734, the Court states that the opposing party was present by counsel (in this case the Plaintiff was represented by attorney Hubbard in the proceedings here and did appear at several of the proceedings in connection with the re-zoning of Plaintiff's property) who made comprehensive statements and furnished Exhibits to the Commission, the Commission members asked questions, cross-examined speaker and received answers although the witnesses who spoke were not sworn many stated reasons why they felt it was improper to grant the proposal. All were given a full opportunity to express themselves and to refute the contra[illegible]ion those who expressed contrary views. This procedure sufficiently constituted trial type hearings as referred to in the City of Louisville v. McDonald case, *supra*. It, therefore, seems to be well established that the legislative body is free to adopt the findings of the Planning Commission without holding an additional trial type hearing. See also *Fiscal Court of Jefferson County* v. *Stallings*, 515 S. W. 2d 234.

Therefore, the Court is of the opinion and finds that the Plaintiff's property was re-zoned from R-7 to R-5A reducing the density of multiple units permitted per acre according to the existing procedure and law of the Commonwealth of Kentucky. Consequently, Plaintiff's Complaint must be dismissed at his cost.

Counsel for Defendant shall tender a judgment accordingly.

Dated this 15th day of August, 1980.

(s) Charles H. Anderson
Judge

CC to: Mr. Gerald Kirven
Mr. Louis Cohen
Mr. Alex F. Talbott

APPENDIX F

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

January 25, 1975

Docket No. 9-130-74

Subject: Proposed changes in the zoning of the Northeast Crescent Hill area.

Notice of this public hearing appeared in The Louisville Times on January 14, 1975, a notice of the hearing and a map of the area involved was posted on the property and notices and a map of the area involved were sent by registered mail to property owners and adjoining property owners as recorded in the Jefferson County Tax Office.

Since the Commission was the applicant, Charles Davis, Hearing Officer, gave a summary of the staff's report accompanied by a slide presentation. (The staff report in full and the script accompanying the slide presentation follow the resolution of this case.)

The following people spoke in favor of the requests:

Crough Venable, 166 North Peterson, Vice President of the Crescent Hill Community Council

Larry Wright, 2065 Sherwood Avenue, a member of the Bonnycastle Homestead Association

George Maiser, Jr., 110 Fenley Avenue, who asked a question and also spoke later in opposition.

The following people requested a change to R-4 single-family residential or requested that the study area be expanded.

Louise Diecks, 266 Claremont Avenue, who also submitted a letter from Thelma I. Kahlz, 265 Claremont

Edward Hoffman, Sr., 204 Fenley Avenue
George Maier, Jr., 110 Fenley Avenue
Wilba Roby, 215 Crescent Court

The following spoke in opposition:

Kyle Hubbard, 1615 Kentucky Home Life Building, who also submitted (1) sheet #13 of the Zoning District Map showing existing zoning by color code (2) a copy of the Comprehensive Plan (3) a copy of the corrections and amendments to the Comprehensive Plan (4) two color snapshots—one of the apartments existing in the area and one of nearby Baptist Seminary (5) six black and white photographs—two of the subject sites prior to the tornado and four of single family dwellings converted to apartments and duplexes (6) a 7" x 10" black and white photograph of Seminary Village taken from the Masonic Home property.

The Executive Director responded to various comments and questions.

A transcript of the public hearing is on file in this docket.

A motion to deny was made by Commissioner Gregory and seconded by Commissioner Pettyjohn.

The vote was as follows:

YES: Commissioners Gregory, Pettyjohn, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Hackett and seconded by Commissioner Tully.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Gregory, Pettyjohn, Reeves and Wilbert

The motion failed.

On a motion by Commissioner Pettyjohn, seconded by Commissioner Hackett, the following resolution was unanimously adopted:

RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby DENY action on this case.

APPENDIX G

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

March 6, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975, at which time action was deferred since a final decision could not be agreed upon.

A motion to deny the rezoning was made by Commissioner Gregory and seconded by Commissioner Reeves.

The vote was as follows:

YES: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Phillips and seconded by Commissioner Hackett.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

The motion failed.

After a discussion on a motion by Commissioner Pettyjohn, seconded by Commissioner Wilbert, the following resolution was unanimously adopted:

> RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby DEFER action on this case.

APPENDIX H

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

March 20, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975, at which time action was deferred since a final decision could not be agreed upon. The request was again considered March 6, 1975 and again no final action was taken.

In executive session this date the attached letter from Kyle Hubbard, Attorney representing on opposing property owner, was read by Commissioner Pettyjohn.

A motion to deny the rezoning was made by Commissioner Gregory and seconded by Commissioner Reeves.

The vote was as follows:

YES: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Phillips and seconded by Commissioner Hackett.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

The motion failed.

After a discussion, on a motion by Commissioner Gregory, seconded by Commissioner Phillips, the following resolution was adopted:

> RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby POSTPONE this case indefinitely.

The vote was as follows:

YES: Commissioners Gregory, Hackett, Phillips, Reeves, Tully and Wilbert

NO: Commissioners Wimsatt and Pettyjohn

The motion carried.

The Executive Director stated that such action could not remove the zoning case because of the Commission's responsibility under KRS 100.

A discussion on the effect of the action to postpone indefinitely followed and the matter was unanimously referred to counsel for his advice.

APPENDIX I

MINUTES AND RESOLUTION OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

April 3, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975 and action was deferred since a decision could not be agreed upon. The request was reconsidered by the Commission March 6 and 20, 1975 with notes of approval and denial ending in a tie.

Mayor Sloane arrived at the executive session in time for discussion of this case. A copy of the entire docket file had been given to the Mayor prior to today's meeting at his request.

The Executive Director spoke in response to questions from the Mayor on the alleged non-conformance of this down-zoning with the Comprehensive Plan Map.

Commissioners Gregory, Tully, Pettyjohn, Reeves and Wilbett explained their reasons for support or for disapproval of the request.

The Site Inspection Committee had revisited the site March 26, 1975.

Kyle Hubbard, Attorney, representing the property owner, 1614 Kentucky Home Life Building, requested that he be allowed to question Mayor Sloane about this case. (A transcript of that questioning is on file in this docket.)

On a motion by Commissioner Phillips, seconded by Commissioner Wilbert, the following resolution was adopted:

WHEREAS, the Commission finds that the proposed change is in conformance with the Comprehensive Plan planning principle which state:

"Existing Sound Residential Areas—Neighborhoods—Should be Conserved, and Deteriorated Residential Areas With Redeeming Qualities Should be Regenerated," and

WHEREAS, the Commission finds that the present zoning is in conflict with the Comprehensive Plan principle which states:

"High Density Development Should Occur in Locations With Immediate or Convenient Access Both to Major Streets and Highways and to Shopping and Public Facilities," and

WHEREAS, the Commission finds that the present zoning is inappropriate and improper because it permits development at a greater density than that which presently exists in the subject neighborhood which should be conserved due to its sound condition, and

WHEREAS, the Commission finds that the destruction caused by the April 3, 1974 tornado constitutes a major change of an economic, physical and social nature within the area involved which was not anticipated in the Community's Comprehensive Plan and which has substantially altered the basic character of the area, and

WHEREAS, the Commission finds that adoption of the proposed zoning change would promote redevelopment of the tornado damaged area in conformance with the Comprehensive Plan

NOW, THEREFORE, BE IT RESOLVED, that the Louisville and Jefferson County Planning Commission does

hereby recommend to the Board of Aldermen of the City of Louisville, that the proposed amendment to the Zoning District Map of Jefferson County, Kentucky, from *R-7 Apartment to R-5A Residential-Apartment* on the following described property be APPROVED.

The vote was as follows:

YES: Commissioners Hackett, Phillips, Sloane, Tully and Wilbert

NO: Commissioners, Wimsatt, Pettyjohn, Gregory and Reeves

The motion carried.

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the Southeast line of a twenty-foot alley adjacent to the property of the Louisville Water Company, thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the Intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle, Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

APPENDIX J

BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE MINUTES

Regular Meeting of the Board of Aldermen
Tuesday, October 14, 1975, at 7:00 P.M.

A Regular Meeting of the Board of Aldermen of the City of Louisville was called to order by President William B. Stansbury at 7 p.m. on Tuesday, October 14, 1975, in the Aldermanic Chambers of the City Hall in Louisville, Kentucky.

Upon a Roll Call, those Present and Absent were as follows:

	Present	Absent
President	Stansbury	
Aldermen	Mershon	
	Bendl	
	Gentry	
	Heuser	
	Kotheimer	
	Lawrence	
	Meyer	
	Bronger	
	Bibb	
	Brown	
	Morris	

President Stansbury called for the Reading of the Minutes. Upon a motion duly made by Aldermen Bronger, seconded by Alderman Mershon, a vote was taken and the Minutes of both the Regular Meeting on September 23, 1975, and the Special Meeting on September 30, 1975, were approved unanimously as published.

. . . .

Alderman Lawrence, next reported favorably on the following two Ordinances and recommended that they be passed. Each Ordinance was read in turn and seconded.

An ordinance to change the zoning from R-7 Apartment to R-5A Residential Apartment in the Northeast Crescent Hill area. (D.N. 9-130-74)

An ordinance to change the zoning from R-5 Residential to C-1 Commercial on the Northeast side of Bardstown Road 498 feet more or less southeast of Goldsmith Lane, fronting on Bardstown Road 191 feet and extending northeast to a depth of 300 feet. (D.N. 9-51-75)

A Roll Call Vote was taken on each and the results are as follows:

AYES: Pres. Stansbury; Ald. Mershon, Bendl, Gentry, Heuser, Kotheimer, Lawrence, Meyer, Bronger, Bibb, Brown, Morris.

Each of the above Ordinances passed with 12 Affirmative Votes, those members present and voting.

. . . .

APPENDIX K

CITY OF LOUISVILLE ORDINANCE No. 128 SERIES 1975

An Ordinance to Change the Zoning From R-7 Apartment to R-5A Residential Apartment in the Northeast Crescent Hill Area. (Docket No. 9-130-74)

WHEREAS, the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the recommendations of the Planning Commission and its staff, and

WHEREAS, the proposed change in zoning is in agreement with the Comprehensive Plan, and

WHEREAS, the original zoning classification given to this property was inappropriate and improper, Now, THEREFORE,

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE:

Section 1. That the herein described property as shown on the District Map accompanying and made a part of Zoning Ordinance No. 66, Series 1971, be and the same is hereby changed from R-7 Apartment to R-5A Residential Apartment as shown by plat attached hereto. Said property is in the City of Louisville and is described as follows:

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the Southeast line of a twenty-foot alley adjacent to the property of the Louisville Water Company; thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle,

Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

Section 2. This Ordinance shall take effect upon its passage and approval.

(s) Edna A. Givens, C.B.A.

(s) William B. Stansbury, P.B.A.

Effective without the signature of the Mayor: Oct. 28, 1975

_____Mayor

APPENDIX L

COURT OF APPEALS OF KENTUCKY

80-CA-1955-MR

(Jefferson Circuit Court No. 208281)

ROBERT L. DURNING, JR., Trustee, Etc., - *Appellant*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Appellees*

NOTICE OF APPEAL—Filed September 7, 1982

Notice is hereby given that the above-named appellant, Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased, hereby appeals to the Supreme Court of the United States from the opinion and judgment of the Kentucky Court of Appeals entered in this action on October 2, 1981, affirming the trial court judgment, and also the order of the Kentucky Court of Appeals denying a rehearing, entered in this action on April 9, 1982. (The Kentucky Supreme Court denied appellant's motion for discretionary review on June 29, 1982.)

This appeal is taken pursuant to 28 U. S. C. §1257(2).

Dated: September 7, 1982

/s/ Gerald Kirven
Gerald Kirven
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722
Attorney for Appellant

APPENDIX M

ADDITIONAL PORTIONS OF RECORD RAISING FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

Proposed Findings of Fact and Conclusions of Law tendered to the trial court by the appellant on March 9, 1979, state in pertinent part:

". . . The plaintiff . . . has alleged in substance that the downzoning ordinance is void because it is unconstitutional, having been enacted by means of a procedure that was arbitrary and denied the property owners due process and equal protection of the laws." (p. 1)

". . . the action of the defendants in downzoning the Durning property violated the provisions of Section 1, Amendment XIV of the Constitution of the United States, which provides in pertinent part:

> "'. . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" (p. 44)

"The Court notes that the plaintiff had pleaded and proved that the downzoning of the Durning property was discriminatory and a violation of the equal protection clause of the Federal Constitution because the R-7 zoned property of Seminary Village (on the same street as the Durning property) could have been downzoned to R-5A, but was not. . . . Also, a small tract at 115 Blackburn Avenue — 1100 feet from the Durning property — could have been downzoned from R-6 to R-5A, but was not. . . . The Supreme Court of the United States has said:

> "'Everyone has a right to demand that he be governed by general rules, and a special statute which, without

his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.' " Cotting v. Godard, 183 U. S. 79, 109 (1901). . . . (pp. 54-55)

"Counsel for the plaintiff is directed to tender a judgment . . . holding invalid Ordinance No. 128, Series 1975. . . ." (p. 55)

The Brief for Plaintiff (R 501-509) filed in the trial court on March 9, 1979, adopts the plaintiff's tendered findings and conclusions (R. 501) and concludes:

". . . the downzoning ordinance enacted by the City of Louisville in connection with the Durning property is an unconstitutional nullity, and this Court should so hold." (R 509)

The opinion of the trial court states in part (R 627):

"The Plaintiff contends that the Ordinance changing the zoning of Plaintiff's property is unconstitutional because it was enacted in an arbitrary proceeding which denied Plaintiff his constitutional rights of due process of law."

Appellant's Brief in the Kentucky Court of Appeals states in part (p. 16):

"THE DOWNZONING IS STATE ACTION WHICH DEPRIVED APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM

THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT, SECTION 1, OF THE UNITED STATES CONSTITUTION . . ."

The Appellant's brief contains four subsections with the following headings:

"A. The Downzoning Denied Appellant Procedural Due Process." (p. 16)

"B. There Was Neither Fairness Nor Even the Appearance of Fairness In The Procedures Which Resulted In Downzoning The Durning Property." (p. 18)

"C. The Downzoning Denied Appellant Substantive Due Process." (p. 19)

"D. The Downzoning Denied Appellant the Equal Protection of the Laws." (p. 20)

The appellant's brief concludes (p. 24):

"The Court should reverse the judgment . . . and remand the case . . . with directions to enter judgment declaring void City of Louisville Ordinance #128, Series 1975, downzoning the Durning property."

Appellant's Motion For Discretionary Review to the Kentucky Supreme Court states the following among "The Questions of Law Involved" (p. 17):

"F. Were the procedures by which the downzoning was accomplished state actions depriving Mr. Durning of property, without due process of law, and denying him the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution . . . ?"

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-402

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, Deceased - - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

On Appeal from Kentucky Court of Appeals

MOTION TO DISMISS APPEAL, AND, ALTERNATIVELY, MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-402

ROBERT L. DURNING, Trustee of Estate of R. L. Durning, Deceased - - *Appellant*

v.

CITY OF LOUISVILLE, et al. - - - *Appellees*

ON APPEAL FROM KENTUCKY COURT OF APPEALS

MOTION TO DISMISS APPEAL PURSUANT TO RULE 16 OF RULES OF SUPREME COURT, AND, ALTERNATIVELY, MOTION TO AFFIRM DECISION OF KENTUCKY COURT OF APPEALS

May it please the Court:

Appellees, City of Louisville, Kentucky, the Board of Aldermen of the City of Louisville, and the Louisville and Jefferson County Planning Commission, pursuant to Rule 16 of the Rules of the Supreme Court move this Court to dismiss the appeal herein, and alternatively, to affirm the judgment of the Court of Appeals of the Commonwealth of Kentucky, on the grounds that the questions on which the decision of the cause depends are so unsubstantial and the decision below so plainly correct as not to warrant further argument. There are no substantive federal ques-

tions to be decided, and the case was properly and adequately decided on a non-federal basis.

ADDITIONAL STATEMENT OF THE CASE

Contrary to Appellant's hyperbolic version of the case as presented in the Jurisdictional Statement, this cause involves nothing more than a challenge to the validity of a zoning ordinance of the City of Louisville as applied to Appellant's property. Acting on the favorable recommendation of the Louisville and Jefferson County Planning Commission, the Louisville Board of Aldermen unanimously adopted an ordinance rezoning Appellant's property from R-7 Apartment to R-5A Apartment following the massively destructive tornado of April, 1974.

The Jefferson Circuit Court and the Kentucky Court of Appeals affirmed and upheld the decision of the Board of Aldermen. The Kentucky Supreme Court refused to take discretionary review of the case.

Appellant has taken one of Louisville's proudest stories—the recovery and reconstruction following a massively destructive tornado—and has artfully contrived from it a lengthy diatribe alleging covert fraud and conspiracy involving hundreds of people, all directed at him. To attempt to even partially rebut, explain or justify the skillfully selected statements Appellant has assembled in order to conjure up the conspiracy against him would require a brief the size of a Dostoevski novel.

The rezoning of Appellant's property, along with hundreds of others in the City of Louisville, was initiated as a result of the April 3, 1974 tornado. The tornado cut a wide path of destruction in the area in which the Appellant's property was located. This destruction had a substantial impact on the physical nature of the affected areas, and threatened the social and economic stability of the surrounding neighborhoods.

The basic character of the affected neighborhoods at the time of the tornado was single family residential, but the zoning maps and the mapped portion of the Comprehensive Plan permitted the development of high-density apartments. Prior to the tornado, this type of development was unlikely since the areas had fully developed into stable, predominantly single-family residential neighborhoods.

After the tornado's devastation, owners of the properties in those neighborhoods affected by the tornado were faced with the decision of rebuilding their residences or selling their property. The uncertainty as to the redevelopment which would occur in the tornado-damaged neighborhoods was a matter of great concern to those residents as well as to others whose properties were not directly affected by the tornado. This concern was vocalized by various neighborhood groups and concerned citizens in the affected areas. The mayor of the City and the Board of Aldermen requested that the Planning Commission study the areas affected by the tornado, re-evaluate the property of the then-existing zoning in light of present circumstances, and make recommendations to the Board of

Aldermen and to the City of Louisville as to possible charges in zoning.

The Planning Commission's evaluation of the affected areas which was published in the *Post Tornado Planning Report* evaluated: 1) the population growth and the demography of the affected area and the city in general, 2) the existing land use pattern of the surrounding area including the zoning classification, and 3) the potential impact of any redevelopment of the areas in light of the principles and goals of the community's comprehensive plan.

The findings of the report were that the existing character of the land use which had developed was not compatible with the zoning which was authorized; that the residential neighborhoods which had developed were sound and viable and that, therefore, the high density development which was permitted in the area by the existing zoning classification would be adverse to the best interest of the public welfare and contrary to the following principle of the comprehensive plan:

> EXISTING SOUND RESIDENTIAL AREAS — NEIGHBORHOODS — SHOULD BE CONSERVED, AND DETERIORATED RESIDENTIAL AREAS WITH REDEEMING QUALITIES SHOULD BE REGENERATED. Residential Planning Principle No. 5, Louisville & Jefferson County Comprehensive Plan (1971).

The applicability of the Report's findings to the Durning property is clearly demonstrated by the maps accompanying the report which related to that prop-

erty and which have been included in the appendix to this brief.

The Durning Tract is the isolated R-7 multi-family parcel identified by Map 21 (Appendix A), located in an area zoned almost entirely R-5 single family residential. Map 5 (Appendix B) indicates that the area has developed predominantly with single family residences although there are some dwellings which have been converted into duplexes and apartments.

The Durning Tract is a large vacant parcel located at the end of narrow, poorly maintained streets which were identified by Map 15 (Appendix C) as having circulation constraints. The pavement of each of these streets dead ends at the Appellant's property. There is no access from the tract to a major arterial without first travelling through the single family development and then crossing a series of railroad tracks.

Map 9 (Appendix D) indicates that there were numerous residences with minor damage near the Durning Tract, two structures with major damage and three structures with serious damage. The Durning Tract was, as the Report concluded, clearly inappropriate for high density multi-family development and the potential for such development threatened the reconstruction efforts of the damaged properties.

The Planning Commission, after reviewing the report and upon a concurring recommendation from its site inspection committee which made several trips to the affected areas, held a special public hearing on January 25, 1975 to review arguments for and against the proposed change in zoning. The Appellant, as a

property owner of the vacant lot zoned high density in one of the areas recommended for rezoning, was present at that meeting and his arguments against the zoning change were presented by his attorney.

After the public hearing, the Planning Commission was divided on the rezoning issue and was unable to recommend approval or disapproval. The division continued through several subsequent meetings in which the issue was reconsidered.

The deadlock was resolved on April 3, 1975, when the Mayor of Louisville, an ex-officio member of the Planning Commission pursuant to Kentucky Revised Statutes (KRS) 100.137, attended a regularly scheduled commission meeting and voted in favor of recommending approval of the rezoning. The proposal was then forwarded to the Board of Aldermen, the legislative body with final authority for proposed zoning amendments. The Aldermen unanimously voted to adopt the ordinance rezoning the property.

The Appellant sought judicial review of the Board's decision by filing an action in the Jefferson Circuit Court pursuant to KRS 100.347. The constitutionally mandated *limited* judicial review of zoning decisions was quickly abandoned in an orgy of discovery in which the Appellant sought to search the records of agencies, public officials, legislators, executive and judicial officers, employees and attorneys for the defendants. The Appellant also sought to depose numerous elected and appointed government officials, employees of governmental agencies and many concerned citizens

involved in the proceedings before the Board and Commission.

Despite strenuous objections that the discovery exceeded the legitimate scope of review, that it was unduly burdensome and that it was unconstitutional, the trial court sustained the Appellant's every motion to compel discovery. The trial court also authorized liberal exceptions to the limitations on discovery by written interrogatories and requests for admissions.

The abuse of discovery allowed in this case created a mountainous record which required over sixteen months from the date of submission until the trial court entered its opinion, conclusions, findings of fact and order dismissing the Appellant's complaint. The Appellant now charges the Appeals Court with error because it was not persuaded by the mountainous record that any wrong-doing had occurred.

Placed in proper perspective, the facts relied upon by the Appellant are not sufficient to overturn the legitimate legislative action which is the subject of this appeal. The trial court properly found that "the facts do not support a finding of fraud or arbitrariness."

ARGUMENT

A.

The Federal Questions Raised on Appeal Are Not Substantial

Appellant, of course, asserts that the questions of alleged federal interest which he has presented in his Jurisdictional Statement are substantial and urges review by the United States Supreme Court. Appel-

lees respectfully disagree and pray this honorable court to dismiss the appeal and to affirm the judgment of Kentucky Court of Appeals.

Appellees submit that the questions presented are not substantial and do not merit further review by this court. Substantiality of a federal question is a somewhat illusive concept that is not amenable to general description. However, one pertinent indicia of a federal question that is not substantial is that the question of federal law is well settled. See, e.g., *Zucht* v. *King*, 260 U. S. 174 (1922). Appellees submit that the jurisprudence of zoning is well-settled by the opinions of this court, and that there is no substantial federal question presented for review in this matter.

The constitutional law of police power regulation over the use of land is well-established. In *Village of Euclid* v. *Ambler Realty Corp.*, 272 U. S. 359, 387-88 (1926), this court set out an enduring rule of law:

> [Zoning regulations] must find their justification in some aspect of the police power asserted for the public welfare.

The court in that opinion also stated that "if the validity of the legislative classification be fairly debatable, the legislative judgment must be allowed to control."

In a recent case, *Agins* v. *City of Tiburon*, 447 U. S. 255, 260 (1980), this court again stated what is generally recognized as the accepted standard:

> The application of a general zoning law to particular property effects a taking if the ordinance does

> not substantially advance legitimate state interests, see *Nectow* v. *City of Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transportation Corp.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978).

In another recent case, *Schad* v. *Borough of Mt. Ephraim*, 452 U. S. 61 (1981), this court confirmed the established character of the constitutional principles of zoning law:

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control/and use and have sustained the regulations if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

The principles of constitutional law controlling the exercise of zoning power are clear, unambiguous and consistent. These established principles of law and constitutional issues of due process, appropriately applied to this case by the Jefferson Circuit Court, the Kentucky Court of Appeals and the Kentucky Supreme Court (which denied discretionary review of the case). The Appellant's Jurisdictional Statement does nothing more than challenge the factual determinations made by the courts of the Commonwealth of Kentucky. These fact and evidence questions are not "substantial federal questions" under the appellate jurisdiction of the United States Supreme Court. No matter how unhappy appellant is with the unanimous decisions of

Kentucky's Trial and Appeals Courts on this case, and no matter how bitter the language, the Jurisdictional Statement simply does not raise any substantial question of federal law.

The Jefferson Circuit Court and the Kentucky Court of Appeals properly resolved the merits of this litigation on the basis of state law governing zoning cases in Kentucky. The trial court and the Court of Appeals found no violation of Kentucky's strict due process requirements for zoning cases, nor any conspiracy or fraud which would be a basis to overturn the decision of the legislative body.

The Court of Appeals found "no arbitrariness or reversible error;" found that the Planning Commission used a "reasonably fair and complete fact-finding procedure;" and found "no failure to comply with the statutes" governing zoning changes.

The trial court opinion, which was adopted *in toto* by the Court of Appeals, dealt with the chronology of events leading to the re-zoning, and measured the activities of the planning and legislative bodies against the procedural, due-process and statutory standards of Kentucky law. The decision of Louisville's legislative body has been upheld at every level of judicial review.

The Appellant has filed over 185 pages of written legal arguments in support of his position in the state courts. Despite his extravagant claims that his constitutional rights were violated, we can find only three references in the entire 185 pages to prior decisions of the United States Supreme Court to support his position. One was the 1901 *Cotting* v. *Godard*, 183 U. S.

79 (1901) decision buried on page 55 of his tendered findings of fact. Another was a vague reference to *U. S.* v. *Nixon*, 418 U. S. 683 (1974) which was cited for the proposition that no man is above the law—a proposition that is axiomatic but which bears little resemblance to the rest of the case. And finally, Appellant cited *McNabb* v. *U. S.*, 318 U. S. 332 (1942) for a quote about the "history of liberty." The almost complete failure to support the allegations of unconstitutionality with federal court citations and authority is reflective of their lack of substantiality.

B.

The Decisions of the Kentucky Courts Rest on an Adequate Non-federal Basis

The only manner in which the Appellant is able to raise even the semblance of a federal constitutional issue is by reciting a version of the facts which has never been accepted by any other party or any other court. The United States Supreme Court cannot act as a trier of fact on this appeal. The United States Supreme Court is therefore bound by the findings made by the trial court unless those findings are shown to be clearly in error, and no such allegation has even been made. Therefore, the decisions of the state courts rest upon a non-federal basis, namely, the conclusiveness of the findings of the trial court which raise no federal issue and, which preclude the movant's attempt to raise federal issues based on a different factual situation.

C.

Appellant Failed to Raise Any Constitutional Issues in a Timely Manner

The Appellant, Robert L. Durning, Jr., is himself a lawyer. In addition he was represented throughout the proceedings before the Louisville and Jefferson County Planning Commission and the Board of Aldermen of the City of Louisville by an attorney who is considered an expert in zoning matters. At no time during those proceedings did the Appellant or his attorney object to the procedures that were being followed. The Appellant was given the notice required by Kentucky statutes; a complete public hearing was held in which his attorney fully presented his views; the Planning Commission made extensive written findings based on the record; none of the decision-makers were shown to have any misunderstandings about the facts involved; and despite an extensive investigation by the Appellant, there was developed not a single shred of direct evidence of any fraud, misconduct or improper motivation. The Movant's very belated claim that he was somehow denied substantive and procedural due process and equal protection of the laws came too late even in the state courts to be given serious consideration.

D.

Appeals Jurisdiction Pursuant to 28 U.S.C. 1257(2) Is Inappropriate in This Case

To call this appeal an attack on an ordinance of the City of Louisville as being unconstitutional is accurate only in the most technical sense. However, this case clearly is not of the type over which Congress intended to grant appeal jurisdiction pursuant to 28 U.S.C. 1257 (2).

The Appellant is not claiming that the city's zoning ordinances which have general application throughout the city are unconstitutional. He is claiming that it is unconstitutional only as to his property; i.e., less than 3 acres located at the end of 3 poorly built deadend roads. It is an attack on an ordinance only because the re-zoning of his property was accomplished by an amendment to the general, city-wide zoning ordinance —an area-wide re-zoning based on a year-long study of the after-effects of the April, 1974 tornado. This litigation, therefore, is unlikely to have any substantial effect upon anyone in the City of Louisville or outside the City of Louisville, except the Appellant. There are no sound public policy reasons for continuing with this litigation, and, surely, no basis in the federal law for going on with it.

CONCLUSION

The appeal filed herein does not come within the meaning and intent of 28 U.S.C. 1257(2) and it should be dismissed for the reasons set out above.

Respectfully submitted,

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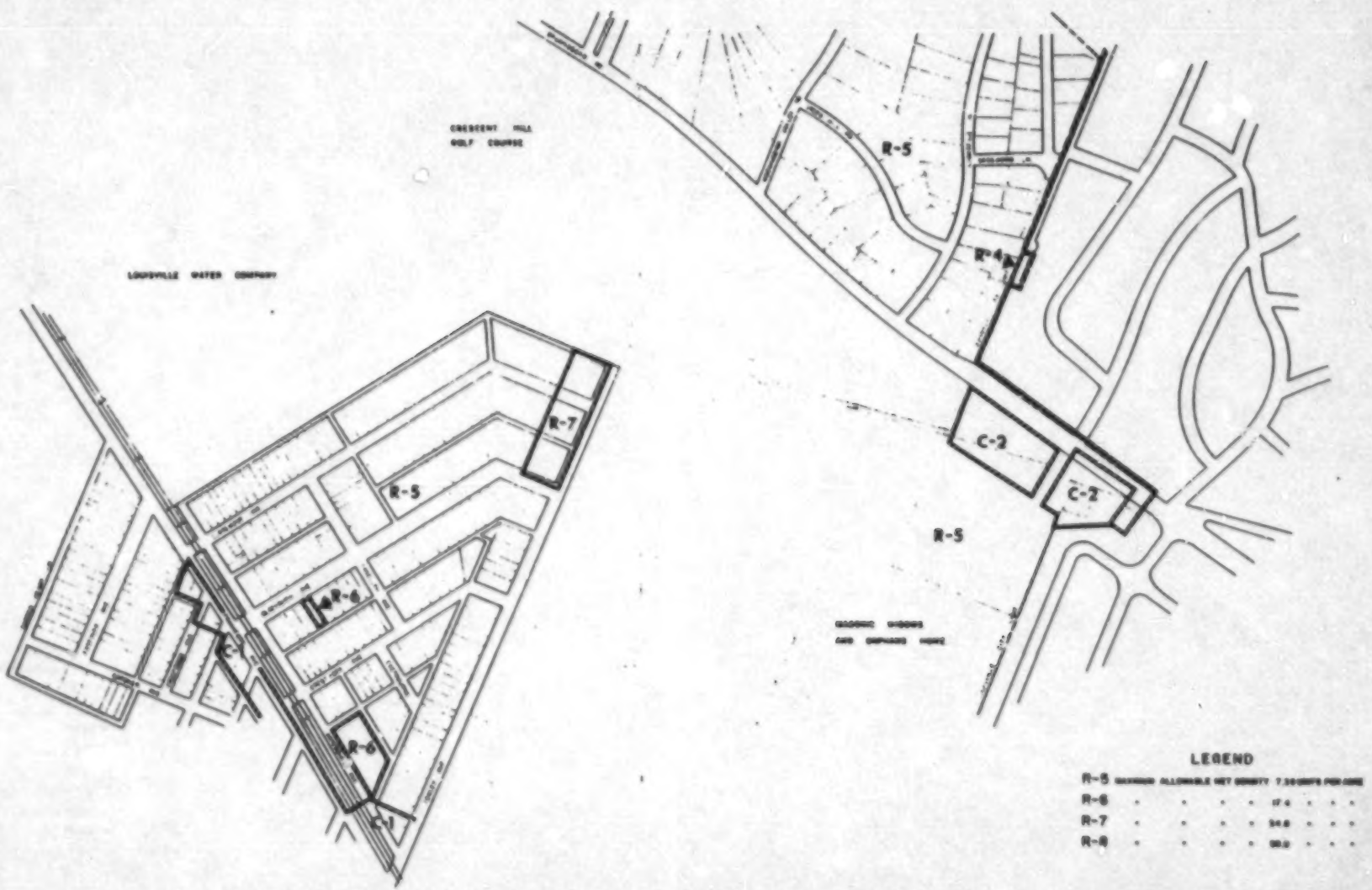
APPENDIX

APPENDIX A



POST-TORNADO NEIGHBORHOOD STUDY

EXISTING ZONING DISTRICTS

NORTHEAST CRESCENT HILL

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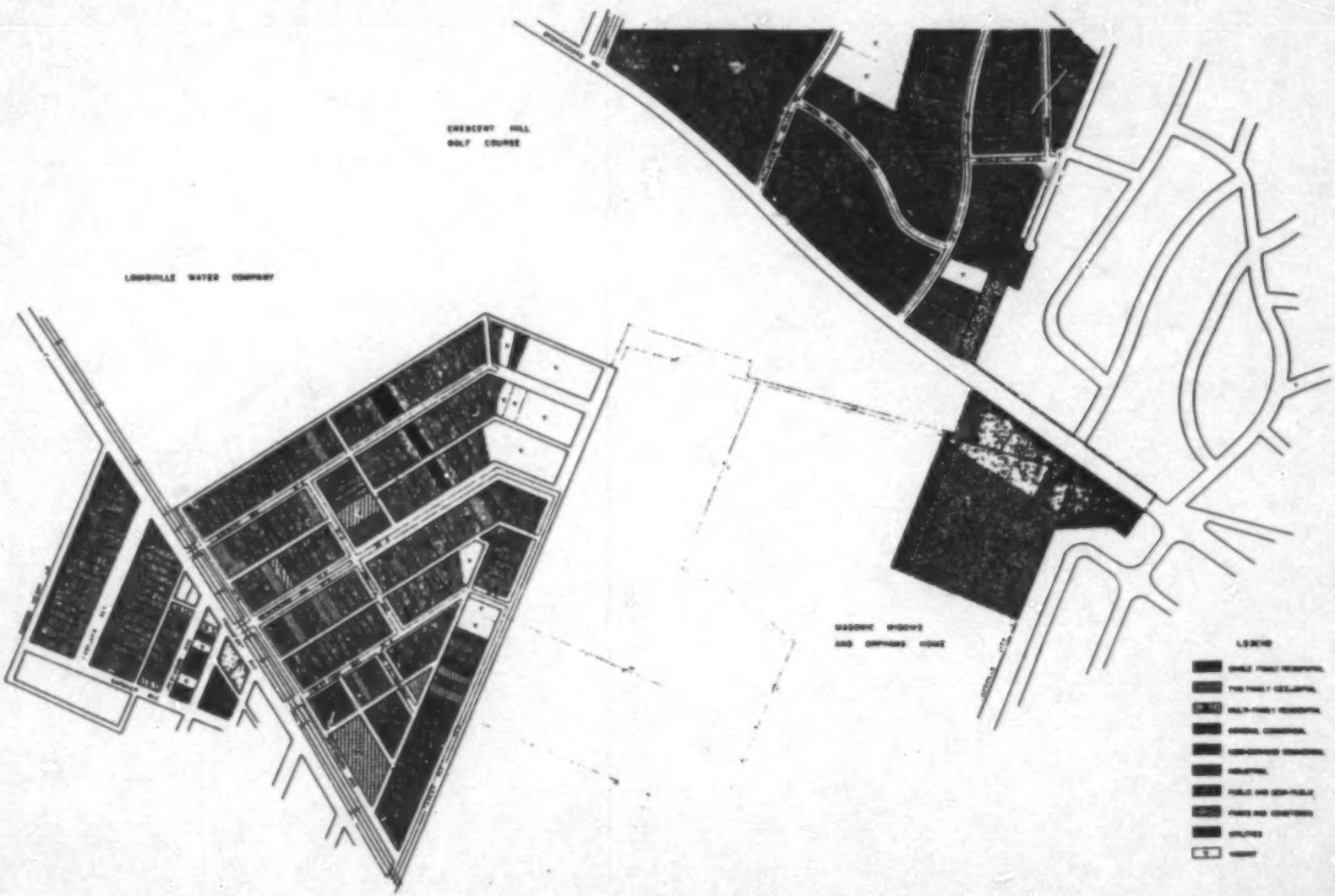
APPENDIX B



POST-TORNADO NEIGHBORHOOD STUDY

LAND USE

NORTHEAST CRESCENT HILL

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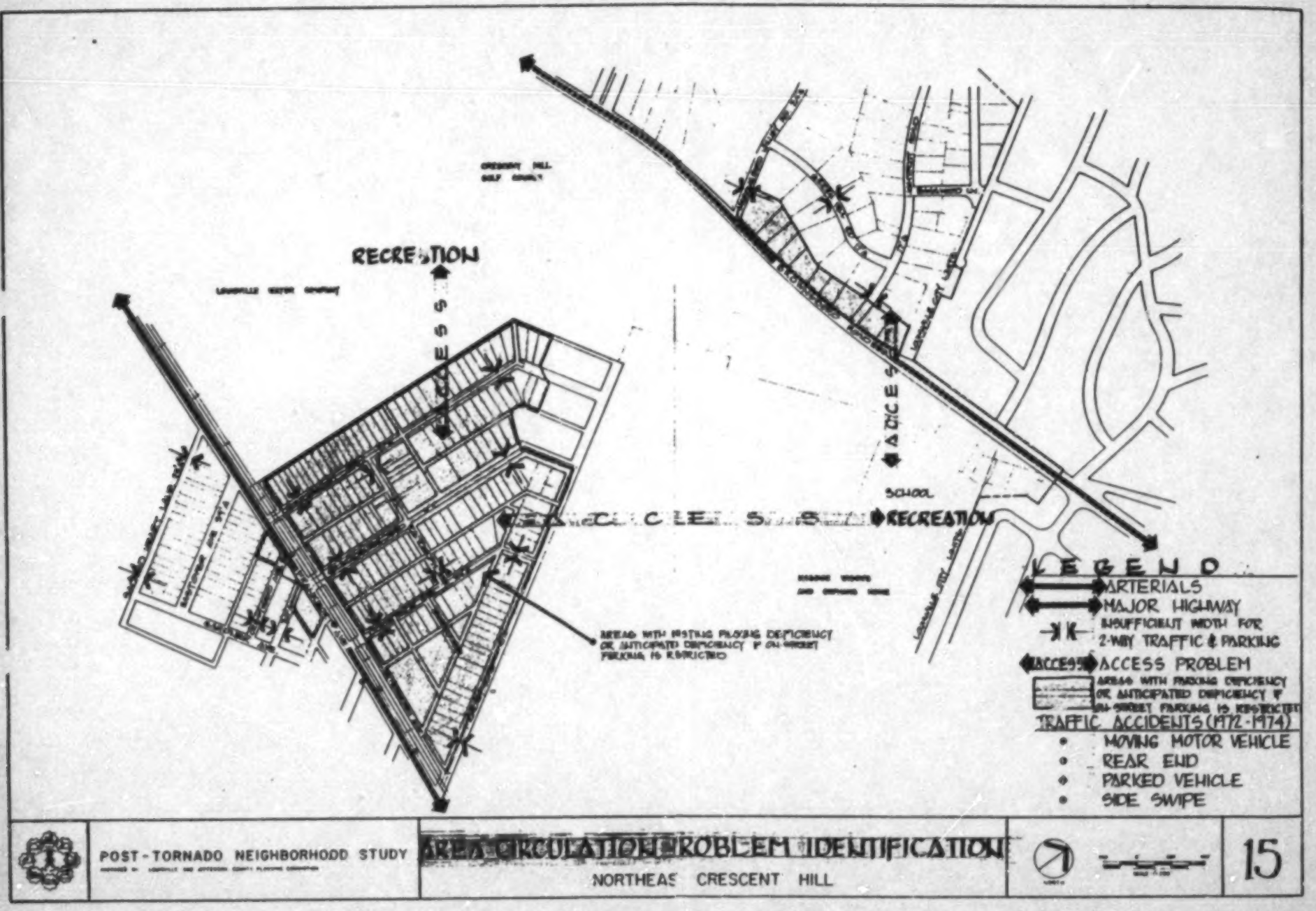
APPENDIX C



POST-TORNADO NEIGHBORHOOD STUDY

AREA CIRCULATION PROBLEM IDENTIFICATION

NORTHEAS CRESCENT HILL

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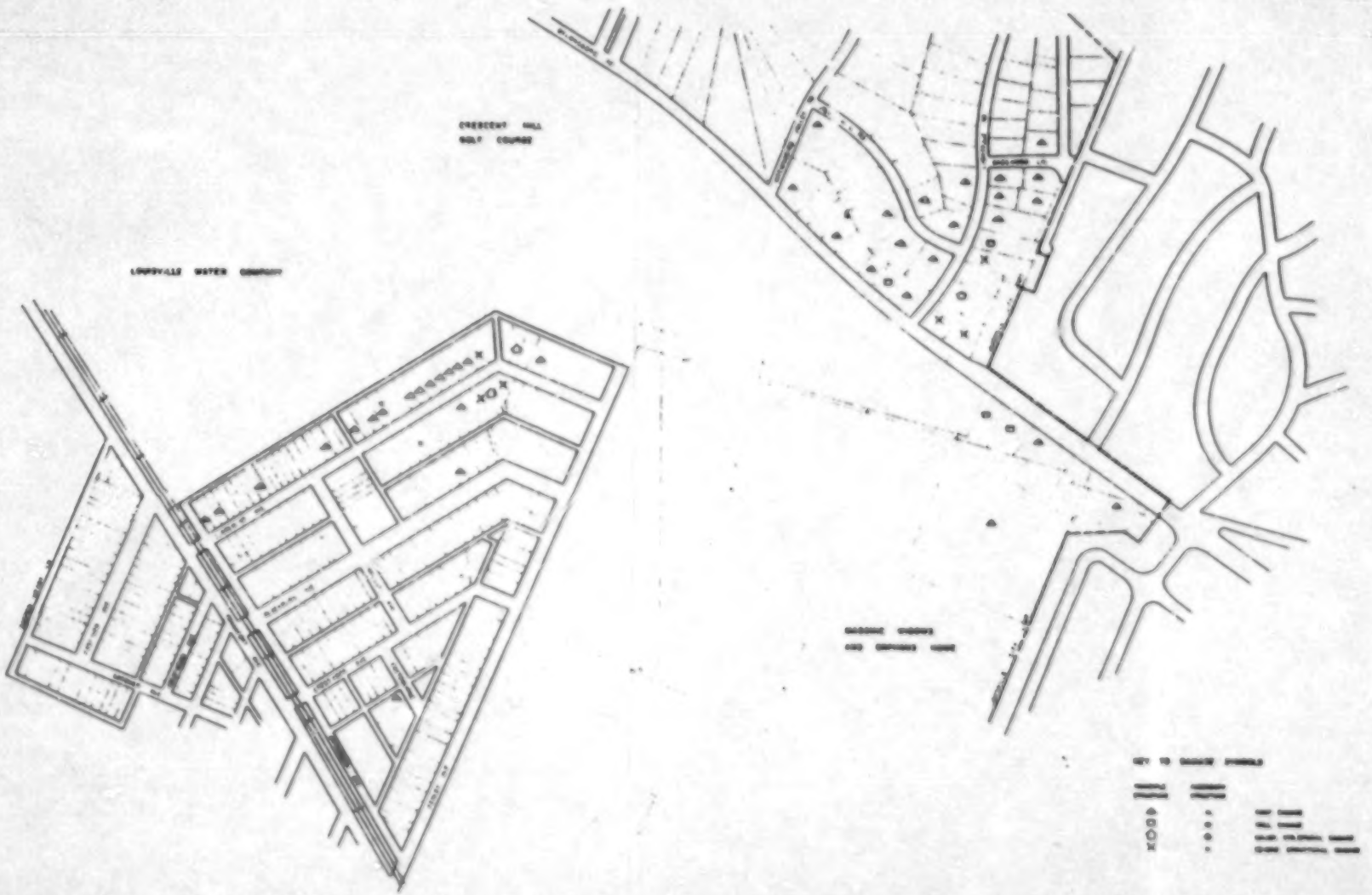
APPENDIX D



POST-TORNADO NEIGHBORHOOD STUDY

STRUCTURAL DAMAGE

NORTHEAST CRESCENT HILL

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CERTIFICATE OF SERVICE

I, Alex F. Talbott, one of the attorneys for appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 6, 1982, I served three copies of the Motion to Dismiss Appeal on the several parties to this appeal separately represented by mailing such copies in duly addressed envelopes, first class postage prepaid, to each of the following attorneys of record at the designated post office address:

Gerald Kirven
Attorney for Appellant
501 South Second Street
Louisville, Kentucky 40202

Kyle T. Hubbard
Attorney for Appellant
730 West Main Street
Louisville, Kentucky 40202

Also I mailed three copies to:

The Hon. Steven L. Beshear
Attorney General of the
Commonwealth of Kentucky
Capitol Building, Room 116
Frankfort, Kentucky 40601

All parties required to be served have been served.

Alex F. Talbott

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Office - Supreme Court, U.S.
FILED
OCT 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-402

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - - Appellant

versus

CITY OF LOUISVILLE, et al. - - - Appellees

Appeal from Court of Appeals of Kentucky

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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IN THE

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No. 82-402

ROBERT L. DURNING, JR., Trustee of Estate of R. L. Durning, deceased - *Appellant*

v.

CITY OF LOUISVILLE, et al. - - - *Appellees*

APPEAL FROM COURT OF APPEALS OF KENTUCKY

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

May it Please the Court:

Appellees, in their joint motion to dismiss/affirm, do not—and cannot—deny Durning's Statement of the Facts. Appellees do offer several arguments which require a brief reply:

First: There are *no* factual issues surrounding Durning's claim of a denial of procedural due process. All pertinent facts stood admitted and uncontrovertible in the tral court, and remain so in this Court.[1] Appellees successfully urged the Kentucky courts to *ignore* these uncontroverted facts, by contending that rezoning is constitutional and, therefore, the *procedures* em-

[1]Jurisdictional Statement, p. 7, n. 1.

ployed to rezone in this case cannot violate the due process clause. The only issues involved on this appeal are issues of *law* and not of *fact*.[2]

Second: This Court's decisions in the field of zoning have dealt almost exclusively with the *substantive* due process requirements for *city-wide* ordinances. The question of *procedural* due process in the enactment of a downzoning ordinance directed at only *one citizen* is unsettled and substantial.[3]

Third: Appellees urge that Durning failed to raise his constitutional claims before the Commission and the Board. However, appellees do not suggest how Durning could possibly have anticipated the irregular procedural steps which began in March of 1975, *after* Durning had presented his evidence at the hearing in January of 1975. Moreover, the mayor's consideration of materials added to the record after the hearing, the mayor's private correspondence with downzoning advocates and his membership in their private organization, as well as the memberships of the two aldermen, and the aldermanic custom to follow the recommendation of the aldermen of the ward where the land lies, did not come to light until discovery proceedings were authorized by the trial court on March 22, 1976, five months after the downzoning ordinance took effect. Appellees' contention that there were insufficient federal cases cited to the Kentucky courts is without merit, moreover the proper framing and presentation

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[2]5A Moore's Federal Practice (2nd Ed. 1982 rev.), ¶ 52.05[1].

[3]Jurisdictional Statement, p. 17, n. 43.

of federal questions does not require citations of federal case law.[4]

Fourth: Appellees' final contention is that 28 U. S. C. § 1257(2) has no application because Durning is not attacking a zoning ordinance of general, city-wide application. It is true that he is attacking an ordinance which relates only to his property. It is precisely *because* the ordinance is not one which affects all property in the City, but is a rezoning of a single tract, that Durning was entitled to a due process adjudicatory hearing.[5] The Kentucky courts upheld this ordinance despite its repugnance to the United States Constitution. Appellees further argue that this litigation likely will affect no one but Durning when actually this case provides opportunity for this Court to settle the conflict among the highest courts of various states as to whether rezoning proceedings are quasi-judicial.[6]

Three items of appellees' brief warrant final comment. (1) They refer to the decision of the Court of Appeals as unanimous. The decision was 2-1, with a strong dissent.[7] (2) Their appendix exhibits fail to show a 26 acre R-7 apartment complex on the same street as the Durning tract.[8] Moreover, within the areas shown, the Durning tract is the only one to be downzoned, proof of the denial of equal protection.

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[4]See *Street* v. *New York*, 394 U. S. 576, 584 (1969).

[5]Jurisdictional Statement, p. 18.

[6]*Id.*, p. 18, n. 45, 46.

[7]*Id.*, pp. 25-27.

[8]Doc. 1 (plat), R. 103, 137, 250-251.

(3) This is not an appeal under KRS 100.347, but is an independent action attacking the validity of a city ordinance.[9]

CONCLUSION

For the foregoing reasons, and based upon the authorities cited, this Court should take jurisdiction of this appeal, or, in the alternative issue a writ of certiorari to the Kentucky Court of Appeals to review its judgment. In either event, this Court should invalidate Ordinance No. 128, Series 1975, of the City of Louisville and reverse the decision of the Kentucky Court of Appeals rendered on October 2, 1981.

Respectfully submitted,

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---

[9]See *City of Louisville* v. *McDonald*, Ky., 470 S. W. 2d 173, 179 (1971).